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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ~~1381~~ 70-85

PAUL M. BRANZBURG - - - - - - Petitioner

versus

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - Respondent

AND

PAUL M. BRANZBURG - - - - - - Petitioner

versus

HENRY MEIGS, Judge, Franklin Circuit Court - - - - - - - - - Respondent

PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

[redacted]

EDGAR A. ZINGMAN
ROBERT C. EWALD
JON L. FLEISCHAKER
WYATT, GRAFTON & SLOSS
300 Marion E. Taylor Building,
Louisville, Kentucky 40202,
Counsel for Petitioner

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

INDEX TO BRIEF

PAGE

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Statement of Questions Presented for Review 2

Constitutional Provisions 2– 3

Statement of the Case 3– 9

Argument 9–16

I. The decisions of the Kentucky Court of Appeals involve an important question of constitutional law which should be settled by this Court 10–15

II. There is a conflict among the courts of appeals and state court decisions 15–16

Conclusion 17

Appendix:

Kentucky Revised Statute 421.100 19
Kentucky Rules of Criminal Procedure 5.02 19
Kentucky Rules of Criminal Procedure 5.06 19
Kentucky Rules of Criminal Procedure 5.12 20
Courier-Journal article of November 15, 1969 20–22
Jefferson Circuit Court minutes of November 25, 1969 23–24
Petition to Kentucky Court of Appeals in *Branzburg* v. *Pound* 25–28
Temporary Order of Prohibition in *Branzburg* v. *Pound* 29–30
Branzburg v. *Pound* decision of November 27, 1970 . 30–38
Motion to Reconsider *Branzburg* v. *Pound* decision . 39

PAGE

Modified Opinion of Kentucky Court of Appeals in *Branzburg* v. *Pound*. 39–44

Mandate of the Kentucky Court of Appeals in *Branzburg* v. *Pound*. 45

Courier-Journal & Louisville Times article of January 10, 1971. 46–58

Subpoena from Franklin County, Kentucky, Grand Jury. 58

Motion to Quash Franklin County, Kentucky, Grand Jury Subpoena. 59–61

Order of Franklin Circuit Court overruling Motion to Quash. 61

Protective Order of Franklin Circuit Court. 62

Petition to Kentucky Court of Appeals in *Branzburg* v. *Meigs*. 63–69

Order of Kentucky Court of Appeals in *Branzburg* v. *Meigs*. 69

Opinion of Kentucky Court of Appeals in *Branzburg* v. *Meigs*. 69–75

Motion for Stay pending petition to Supreme Court for certiorari in *Meigs* and *Pound* cases. 76

Motion for temporary writ of prohibition pending petition to Supreme Court for certiorari in *Meigs* case. 77

Order of Court of Appeals denying temporary stay pending Petition to Supreme Court for Certiorari. 78

Order of Court of Appeals denying temporary prohibition or other relief pending Petition to Supreme Court for Certiorari. 79

TABLE OF AUTHORITIES

Cases:

PAGE

Associated Press v. *United States*, 361 U. S. 1 (1944) 11

Bates v. *Little Rock*, 361 U. S. 516 (1960) 15

Caldwell v. *United States*, 434 F. 2d 1081 (9th Cir. 1970) 7, 16, 17

Garland v. *Torre*, 259 F. 2d 545 (2nd Cir.) *cert. denied*, 358 U. S. 910 (1958) 16

Gibson v. *Florida Investigation Committee*, 372 U. S. 539 (1960) 13, 14

In re Goodfader's Appeal, 45 Hawaii 317, 367 P. 2d 472 (1961) 16

Grosjean v. *American Press Co.*, 297 U. S. 233 (1935) 13

Louisiana ex rel Gremillion v. *National Association for the Advancement of Colored People*, 366 U. S. 293 (1961) 14

National Association for the Advancement of Colored People v. *Button*, 371 U. S. 415 (1963) 12, 13, 15

New York Times v. *Sullivan*, 376 U. S. 254 (1964) 11

State v. *Buchanan*, Ore., 436 P. 2d 729, *cert. denied*, 392 U. S. 905 (1968) 16

Stromberg v. *California*, 283 U. S. 359 (1931) 11

Talley v. *California*, 362 U. S. 60 (1960) 13

Constitutional Provisions:

First Amendment to the Constitution of the United States 2, 3, 6, 7, 8, 10, 11, 12, 14, 15, 16

Fourteenth Amendment to the Constitution of the United States 4, 6

Statutes:

28 U.S.C. ~~§1254(1)~~ 1257 (3) 2

Kentucky Revised Statutes

Chapter 29 4

KRS 421.100 6

Statutes: (Cont'd)

PAGE

Procedural Rules

Supreme Court Rule 23.5 4

Kentucky Rules of Criminal Procedure

R Cr 5.02 4

R Cr 5.06 5

R Cr 5.12 4

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AND

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PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

BRIEF FOR PETITIONER, PAUL M. BRANZBURG

May it please the Court:

OPINIONS BELOW

The opinions of the Kentucky Court of Appeals are printed in Petitioner's Appendix at pages 31, 40 and 70, and have not yet been officially reported.

JURISDICTION

The date of entry of the judgments sought to be reviewed is January 22, 1971. This Court has jurisdiction to hear this case under the provisions of 28 U.S.C. ~~§1254(1)~~ 1257(3).

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from compelling a reporter to disclose confidential information received by him in the course of his news gathering activities?

II. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from creating a chilling effect upon a reporter's news gathering potential by compelling him to enter the grand jury room to respond to inquiry into information obtained by him confidentially in his capacity as a news gatherer.

CONSTITUTIONAL PROVISIONS

The Constitutional provision here involved is the First Amendment to the Constitution of the United States, which is set out verbatim as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment is made applicable to the state action here involved by reason of Section 1 of the

Fourteenth Amendment to the Constitution of the United States, which is set out verbatim as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This brief is filed on behalf of Paul M. Branzburg, against the Respondents, John P. Hayes, and Henry Meigs, who are judges in trial courts of general jurisdiction, the circuit courts in Jefferson County and Franklin County, Kentucky. In two separate actions the Respondents overruled the Petitioner's refusals to appear before a grand jury and to answer questions asked of him by a grand jury. His refusals were based on his rights under the First Amendment of the Constitution of the United States. Both courts announced that contempt proceedings would follow continued refusal. In each case the Kentucky Court of Appeals affirmed the rulings of the Respondents, and thereby authorized the Respondents to punish Petitioner for contempt of court in the event Petitioner failed to answer certain questions which he had objected to in one case, and

failed to appear before the grand jury in the other case. Pursuant to Rule 23.5 of this Court a single petition for writ of certiorari is filed covering both cases, because those two cases involve closely related questions.

Petitioner is an investigative reporter employed by the Louisville Courier-Journal, a daily newspaper published in Jefferson County, Kentucky. In his capacity as a reporter for said newspaper the Petitioner has made particular efforts to become acquainted with the "hippie community" in Jefferson County and other parts of Kentucky. The Petitioner had devoted several newspaper stories and articles to the problem of drug abuse within Jefferson County and other parts of Kentucky. The two newspaper articles which are the subject of the controversy here involved were the result of the Petitioner's efforts in this area.

The Respondents are circuit judges in Jefferson County and Franklin County, Kentucky. Under applicable Kentucky statutes, the grand jury for each county is convened in the circuit court of that county (Kentucky Revised Statutes, Chapter 29). Pursuant to the Kentucky Rules of Criminal Procedure 5.02 (Appendix, p. 19), the circuit court shall swear the grand jurors and charge them to inquire into any violation of the law which may come to their attention. Pursuant to Kentucky Rules of Criminal Procedure, Section 5.12 (Appendix, p. 20), when a witness before a grand jury refuses to testify or to answer a question put to him, the foreman shall state the refusal to the court in the presence of the witness. If the court

decides that the witness is bound to testify and the witness persists in his refusal, the court shall proceed against the witness as in cases of similar refusal in open Court. Pursuant to Kentucky Rules of Criminal Procedure, Section 5.06 (Appendix, p. 20), the attendance of witnesses in grand jury proceedings may be coerced as in other judicial proceedings.

The first of these two consolidated cases was brought in the Jefferson County Circuit Court, Criminal Branch, Second Division, before the Honorable J. Miles Pound, the predecessor of the Respondent, John P. Hayes.

The Petitioner wrote an article which appeared in the November 15, 1969, edition of the Courier-Journal (Appendix, p. 20). This article described with considerable detail the efforts of two young Louisville, Kentucky, residents in producing enough hashish from marijuana to net them an income of $5,000.00 for three weeks of work. The article included a photograph of a pair of hands working above a laboratory table containing what was identified as hashish. The article stated that the individuals involved had received a promise that their names would be held in confidence. The article also quoted one of the two as saying: "I don't know why I'm letting you do this story. To make the narcs mad, I guess. That's the main reason."

As a result of this article, the Petitioner was subpoenaed before the Jefferson County Grand Jury and was asked to identify persons mentioned in the newspaper article. The Petitioner refused to answer these questions, and pursuant to the applicable rules the

Petitioner was brought before the Circuit Judge, where the foreman of the grand jury read the following questions to the Judge which the Petitioner had refused to answer:

> 1. On November 12, or 13, 1969, who was the person or persons you observed in the possession of marijuana about which you wrote an article in the Courier-Journal on November 15, 1969?
>
> 2. On November 12, or 13, 1969, who was the person or persons you observed compounding marijuana, producing the same to a compound known as hashish?

After hearing argument of counsel, the Court required that the Petitioner answer these questions, and counsel for Petitioner objected to the Court's ruling on the basis of the freedom of press guarantees under the First Amendment to the Constitution of the United States (Appendix, p. 24).

Counsel for Petitioner immediately filed a petition for temporary and permanent relief against Judge Pound in the Kentucky Court of Appeals (Appendix, p. 26). On November 25, 1969, the Kentucky Court of Appeals granted a Temporary Order of Prohibition pending review of the case on its merits (Appendix, p. 30). The Petition requested relief pursuant to the First and Fourteenth Amendments to the Constitution of the United States, as well as a Kentucky statute, KRS 421.100 (Appendix, p. 19), which granted newspaper personnel immunity from disclosing "sources of information."

On November 27, 1970, the Kentucky Court of Appeals determined that the phrase "source of information" in the Kentucky statute did not protect information obtained by the reporter's personal observation, and thus decided that the Petitioner had no immunity under the statute in this particular case. The Court of Appeals also rejected the Petitioner's First Amendment arguments (Appendix, p. 31).

Pursuant to the rules of the Kentucky Court of Appeals, Petitioner filed a Motion to Reconsider based on the November 16, 1970, decision of the United States Court of Appeals for the Ninth Circuit in *Caldwell* v. *United States,* 434 F. 2d 1081. The Petitioner urged the Court to reconsider Petitioner's First Amendment arguments (Appendix, p. 40).

In the case involving the Respondent Meigs, the Petitioner wrote an article concerning the use of marijuana and other drugs in Franklin County, Kentucky, which appeared in the Courier-Journal & Louisville Times on January 10, 1971 (Appendix, p. 47).

Petitioner was subpoenaed to appear before the Franklin County Grand Jury on the 18th day of January, 1971, to testify in a matter of "violation of statutes concerning the use and sale of drugs" (Appendix, p. 59).

Petitioner appeared before Judge Meigs on January 18, 1971, and moved the Respondent to quash the grand jury subpoena and excuse the Petitioner from testifying before the Franklin County Grand Jury. Said motion was based on Petitioner's First Amend-

ment rights under the Constitution of the United States (Appendix, p. 60).

Judge Meigs denied the Petitioner's motion, but issued a protective order in regard to the testimony of the Petitioner before the grand jury (Appendix, p. 62).

Petitioner immediately filed with the Court of Appeals of Kentucky a petition requesting a writ prohibiting Judge Meigs from requiring Petitioner's appearance before the grand jury and mandamusing Judge Meigs to quash the subpoena issued by the grand jury (Appendix, p. 64).

On January 22, 1971, the Court of Appeals modified its opinion, (Appendix, p. 40) thus denying Petitioner's Motion to Reconsider in the *Pound* case, and also denied Petitioner's request for writs of prohibition and mandamus in the *Meigs* case (Appendix, p. 70). The Court of Appeals followed the *Meigs* order with an opinion in which it refused to recognize Petitioner's First Amendment rights in the particular situation involved and specifically rejected the holding of the Court of Appeals for the Ninth Circuit in *Caldwell, supra* (Appendix, p. 70).

Petitioner then moved for an order staying the effective date of the order of the Court of Appeals in both the *Pound* and *Meigs* cases until Petitioner could obtain a writ of certiorari from the Supreme Court, and Petitioner additionally moved for a temporary writ of prohibition against Respondent Meigs until a writ of certiorari from the Supreme Court could be obtained (Appendix, pp. 77 and 78). The Court of Ap-

peals denied the requested stays and writ (Appendix, pp. 79 and 80).

On January 26, 1971, Mr. Justice Stewart temporarily restrained Respondents from compelling Petitioner to appear before the grand juries in Jefferson County or Franklin County, Kentucky, pending petition for certiorari to the Supreme Court.

The Petitioner seeks a determination from this Court that he cannot be required to answer the questions posed to him by the Jefferson County Grand Jury and cannot be required to appear and give testimony before the Franklin County Grand Jury.

ARGUMENT

In the cases here presented the following circumstances exist which constitute special and important reasons for review on a writ of certiorari:

I. The decisions of the Kentucky Court of Appeals involve an important question of constitutional law which should be settled by this Court.

II. There is a conflict among the courts of appeals and state court decisions.

I

The Decisions of the Kentucky Court of Appeals Involve an Important Question of Constitutional Law Which Should Be Settled by This Court.

The Kentucky Court of Appeals has failed to recognize the fundamental principle upon which the Petitioner relies: That the First Amendment's shield of protection extends to cover confidentially received names of persons who supplied information for publication to news reporters. The Petitioner believes that the protection of such confidences is a fundamental part of the First Amendment protections, and while certain decisions of this Court clearly imply such protection, the issue has not been specifically dealt with, nor has the extent of said protection been clearly defined. The issue is one of great and immediate importance because of an increasing disposition of various governmental agencies to use news reporters as fact finding instruments, rather than relying on the government's own vast resources to seek out information.* The press cannot be utilized as an arm of law enforcement and at the same time fully carry out its constitutionally recognized function of informing the general public of the important issues of the day. For these reasons immediate review of this issue is necessary.

The Supreme Court has long recognized the important position that the First Amendment has in our soci-

*Indeed, the pattern exhibited here of disinterest by prosecutors until the matter is spread in the news media, followed by immediate grand jury inquisition of the responsibile reporters, raises the question whether the very objective is not to cut off the sources of these embarrassing disclosures.

ety. The "profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964), is threatened today by increasing pressure from both state and federal officials on members of the press to disclose information obtained by them for the purpose of preparing stories relating to issues of public concern and public debate.

This national commitment to a free exchange of ideas has been emphasized repeatedly by this Court. It has been said that the purpose of the First Amendment is to secure "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press* v. *United States*, 326 U. S. 1, 20 (1944), and that "the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg* v. *California*, 283 U. S. 359, 369 (1931).

Increasingly, due to this pressure from state and federal officials, news reporters are being placed in the difficult position of having to make a choice between subjecting themselves to prison terms in order to keep the public fully informed about issues to which there is heated public debate, or self censorship of their own publications. Such self censorship, amounting in fact to a restraint on the press and freedom of speech due to the threat of state action, is inimical to the ideals

embodied within the First Amendment. This chilling effect on the exercise of First Amendment rights derives not only from the state's attempts to force the reporter to divulge his background information, but also from the prospect of the prosecution of news reporters by the state. Potential informants will be much less likely to speak to such reporters if in doing so they know the increased risk of exposure they present to themselves. The freedoms protected by the First Amendment

> are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. [*National Association for the Advancement of Colored People* v. *Button*, 371 U. S. 415, 433 (1963)]

The protection granted by the First Amendment to the freedom of the press has long been recognized as including more than merely the freedom to publish. It is obvious that the freedom to publish is meaningless if the freedom to obtain the information to be published is destroyed. The chilling effect upon a reporter's ability to obtain information from unorthodox or deviant areas of society, resulting from the unrestricted ability of grand juries to compel reporter attendance and testimony immediately after publication of stories dealing with these elements of society, is readily apparent. The affidavit of the Petitioner (Appendix, p. 67) demonstrates the immediate onset of this effect following upon the grand jury efforts here.

Clearly, the freedom to publish must necessarily encompass the freedom to have access to and obtain the information to be published.

> The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens. [*Grosjean* v. *American Press Co.*, 297 U. S. 233, 249-250 (1935) (quoting 2 Cooley, Const. Lim., 8th ed., p. 886)].

Thus, this Court has recognized that there are circumstances in which the anonymity of the person speaking must be protected in order to protect his right to speak, and the right of the public to be informed. In certain situations, the Court has determined that a requirement of the state that the speaker be identified would have a "chilling effect" upon that person's right to speak. See, *e. g., Talley* v. *California,* 362 U. S. 60 (1960); *Gibson* v. *Florida Investigation Committee,* 372 U. S. 539 (1963); *cf. National Association for the Advancement of Colored People* v. *Button, supra.* In *Talley, supra,* at 65, the Court emphasized that the reason for the protection of anonymity "was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."

The same situation is presented by a requirement that a reporter must divulge the names of those who confidentially furnished him information for publication relating to matters of public concern, and which

are the subject of vigorous public debate. If the reporter is required to divulge this information, he, as well as all news gatherers, will soon be in the position of being unable to obtain such information, and the public will be deprived of information and the varying points of view necessary to make informed decisions on matters of public concern.

This Court has repeatedly emphasized that where First Amendment rights are involved, only a compelling state interest can justify restrictions on the effective exercise of these rights. *See, e.g. Louisiana ex rel. Gremillion* v. *National Association for the Advancement of Colored People,* 366 U. S. 293 (1961); *Gibson* v. *Florida Investigation Committee, supra; National Assiciation for the Advancement of Colored People* v. *Button, supra.* Only after the state has shown this compelling interest can it then constitutionally engage in activities that restrict the exercise of constitutional rights by private citizens.

Nevertheless, the Commonwealth of Kentucky has made no effort whatsoever to justify its desire to obtain the information in question from Mr. Branzburg. Despite the fact that

> it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest. [*Gibson* v. *Florida Investigation Committee, supra,* at 546.]

the Commonwealth has made no showing that the information was unobtainable by other means or that it was necessary to protect a compelling state interest.

The Kentucky decisions have shifted to the reporter the duty to show he is entitled to the protection of the First Amendment. Such a ruling is a serious infringement on the fundamental rights here involved. This Court has consistently held that where there is an encroachment or limitation upon rights and freedoms guaranteed by the Constitution, the state may prevail only by showing a compelling state interest which subordinates the right or freedom involved. *Bates* v. *Little Rock,* 361 U. S. 516 (1960); *National Association for the Advancement of Colored People* v. *Button, supra.* The burden should be on the state, not the individual.

The question of newsmen's rights under the First Amendment is an issue of current public importance which has not yet been clearly defined by this Court. To allow the present questions to continue unanswered would itself be a severe limitation on freedom of the press.

II

There Is a Conflict of Decision Among the Courts of Appeals and State Court Decision.

The decisions in various jurisdictions in the United States, both federal and state, show that a conflict has developed in regard to the asserted constitutional right of a newsman to refuse to respond to a subpoena to appear before a grand jury, to answer certain questions

posed by a grand jury, or to disclose the names of persons who supplied information for publication upon the condition and confidence that their names would not be revealed.

Upon occasion, in the past, it has been asserted that the First Amendment rights of freedom of speech and freedom of the press are subordinate to, and yield to the right of the state to proceed with its judicial functions. *See, e.g., Garland* v. *Torre,* 259 F. 2d 545 (2nd Cir. 1958), *cert. denied,* 358 U. S. 910 (1958); *State* v. *Buchanan,* 436 P. 2d 729 (Ore.), *cert. denied,* 392 U. S. 905 (1968); *In Re Goodfader's Appeal,* 45 Hawaii 317, 367 P. 2d 472 (1961). Recently, however, the Court of Appeals for the Ninth Circuit has recognized the clear predominance of First Amendment rights over the right of the state to compel Grand Jury attendance, *Caldwell* v. *United States, supra.* This decision recognized the importance of confidential sources to a news gatherer in his attempt to inform the public of all points of view in regard to an issue of public interest.

The Kentucky Court of Appeals in the instant cases has considered the decision in Caldwell, but has rejected its findings in favor of the view that the sources of information of a newspaper reporter and background information developed on a confidential basis are not privileged under the First Amendment.

CONCLUSION

The issue here involved presents special and important reasons to grant a writ of certiorari. This Court has never ruled on the issue, yet it is one most basic to the fundamental rights of freedom of the press and freedom of speech. Where the rights of the public to be informed on controversial issues of the day are threatened by state action, the most compelling reasons for review are presented. In this case the applicable law has not been clearly defined and definition is absolutely necessary to the function of the Petitioner, and others like him, as news reporters. The Kentucky Court of Appeals has specifically denied recognition of the rights asserted here and has disputed the logic and theory of the Ninth Circuit in *Caldwell, supra.* The lack of precise authority in the lower courts, because of the conflicts of decisions, adds to the confusion.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Kentucky Court of Appeals.

Respectfully submitted,

EDGAR A. ZINGMAN,
ROBERT C. EWALD,
JON L. FLEISCHAKER,
WYATT, GRAFTON & SLOSS,
300 Marion E. Taylor Building,
Louisville, Kentucky 40202,

Counsel for Petitioner.